COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

17-P-675

COMMONWEALTH

vs.

KELLY ANN SIMONETTA.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

Kelly Simonetta was convicted by a Superior Court jury of reckless endangerment of a child, possession of a class A drug (heroin), and possession of a class E drug (lidocaine). On appeal, Simonetta argues that (1) the evidence was insufficient to sustain her conviction of reckless endangerment of a child; (2) the jury instructions were flawed; (3) the admission of hearsay evidence created a substantial risk of miscarriage of justice; and (4) the prosecutor's closing argument was improper. We affirm.

Discussion. 1. Sufficiency of the evidence. Simonetta first contends that there was insufficient evidence to prove that her conduct was wanton or reckless as defined by G. L. c. 265, § 13L. We consider this claim to determine whether, viewing the evidence in the light most favorable to the

Commonwealth, any rational finder of fact could have found each of the elements of the offense beyond a reasonable doubt. See Commonwealth v. Latimore, 378 Mass. 671, 676-677 (1979).

"[W]anton or reckless behavior occurs when a person is aware of and consciously disregards a substantial and unjustifiable risk that his acts, or omissions where there is a duty to act, would result in serious bodily injury . . . to a child." G. L. c. 265, § 13L. Wanton or reckless conduct "has long been understood in the criminal law as 'intentional conduct . . . involv[ing] a high degree of likelihood that substantial harm will result to another.'" Commonwealth v. Figueroa, 83 Mass. App. Ct. 251, 259 (2013), quoting Commonwealth v. Levesque, 436 Mass. 443, 451-452 (2002).[1] "Such intentional conduct 'is grounded in intent to engage in the reckless conduct and not intent to bring about the [substantial risk of serious bodily injury].'" Commonwealth v. Figueroa, supra, quoting Levesque, supra at 452. Further, the Commonwealth must prove the defendant's subjective awareness of the risk in order to sustain a conviction. See Commonwealth v. Coggeshall, 473 Mass. 665, 670 (2016).

Here, a rational fact finder could have found that Simonetta intended to engage in the reckless conduct of placing

[1] Proof of injury is not required, only proof of a substantial risk of injury. See Figueroa, 83 Mass. App. Ct. at 261.

an unsecured, prescription drug in a drawer where her two daughters would likely find it and then leave her daughters untended. Considering that the children were known to be fascinated by the contents of the drawer, to which they had previously gained access on multiple occasions, and Simonetta's knowledge of the effect that the drug had on an adult, we are satisfied that the jury had sufficient evidence to understand that this behavior created a substantial and unjustifiable risk of serious bodily injury to a child. See Commonwealth v. Hendricks, 452 Mass. 97, 103 (2008). Nothing more was required. See Figueroa, 83 Mass. App. Ct. at 261.

2. Jury instructions. For the first time on appeal Simonetta argues that the judge erred by failing to instruct the jury that the Commonwealth was required to prove that she was subjectively aware of the risk she posed to her daughter and that such error created a substantial risk of a miscarriage of justice.[2] We disagree.

A substantial risk of a miscarriage of justice exists when an appellate court has a serious doubt whether the result of the trial might have been different had the error not been made. See Commonwealth v. Alphas, 430 Mass. 8, 13 (1999). "Errors of

[2] Because there was no objection at trial, we review this claim for error and, if there was error, for a substantial risk of a miscarriage of justice. See Commonwealth v. Rivera, 91 Mass. App. Ct. 796, 801 (2017).

this magnitude are extraordinary events and relief is seldom granted." Commonwealth v. Kelly, 470 Mass. 682, 700 (2015). "We evaluate jury instructions as a whole and interpret them as would a reasonable juror." Commonwealth v. Marinho, 464 Mass. 115, 122 (2013). Here, in addition to the instructions in the court room, the jury were provided with written instructions by the judge to be used while they were deliberating. The written instruction on the charge of child endangerment included that the jury must find beyond a reasonable doubt that Simonetta engaged in wanton or reckless conduct. Further, the instruction included that this type of conduct "occurs when a person is aware of and consciously disregards a substantial and unjustifiable risk." We agree with Simonetta that the judge erred in including additional language in the charge that either "the defendant knew or a reasonable person would have known" that her conduct "involved a high degree of likelihood that substantial harm would result." Consequently, the judge did not properly set forth each essential element of the offense charged.[3] Nonetheless, as we have previously discussed, the evidence amply established that Simonetta was subjectively aware of the risk she posed to her daughter. We are persuaded that

[3] General Laws c. 265, § 13L, requires proof of a "defendant's subjective state of mind with respect to the risk involved. That is, he must be shown to have been actually aware of the risk" of serious bodily injury. Coggeshall, 473 Mass. at 670.

the judge's erroneous instruction did not materially influence the guilty verdict and, therefore, the error did not create a substantial risk of a miscarriage of justice. See Alphas, 430 Mass. at 14.

3. Hearsay evidence. Next, Simonetta contends that defense counsel's failure to object to hearsay evidence constitutes ineffective assistance of counsel. Here, the jury heard from a Commonwealth witness that Simonetta's boyfriend had told the witness that Simonetta was sleeping when he entered the apartment and found the girls with the pills. Since "the alleged ineffectiveness amounts to nothing more than a failure to preserve claims for appeal, we need only ask whether those claimed errors produced a substantial risk of a miscarriage of justice." Commonwealth v. Randolph, 438 Mass. 290, 297 (2002). The Commonwealth concedes that the challenged testimony was hearsay but maintains that the statements did not prejudice Simonetta. We agree.

In reviewing Simonetta's conviction, we will "not disregard the theory of law on which the parties proceeded at trial." Commonwealth v. Monteagudo, 427 Mass. 484, 487 (1998), quoting Commonwealth v. Thompson, 382 Mass. 379, 382 (1981). We conclude that given Simonetta's trial strategy was that she was not reckless by storing the pills in the drawer, and that she acknowledged leaving the two children alone in the room where

she had stored the pills, the jury's consideration of the hearsay testimony did not create a substantial risk of a miscarriage of justice. See Commonwealth v. Silva, 431 Mass. 401, 405-406 (2000).

4. Prosecutor's closing argument. Lastly, we review under the "miscarriage of justice" standard, Simonetta's claims of error regarding the prosecutor's closing argument, to which no objection was made or curative instruction requested. See Commonwealth v. Jones, 471 Mass. 138, 148 (2015).

First, Simonetta claims that the prosecutor's remarks concerning the significance of the bedside table went beyond the evidence presented at trial and any fair inferences that could be drawn from the evidence. Although prosecutors are not permitted to "misstate the evidence or refer to facts not in evidence" during closing arguments, Commonwealth v. Kozec, 399 Mass. 514, 516 (1987), they are "entitled to marshal the evidence and suggest inferences that the jury may draw from it." Commonwealth v. Drayton, 386 Mass. 39, 52 (1982). Here, the prosecutor did just that. Evidence admitted at trial included that Simonetta kept her nail polish in the bedside table drawer, that the girls were fascinated by the bedside table drawer and the nail polish, that the girls were constantly getting into the drawer, and that duct tape was used to try to prevent the girls from opening the drawer. There was no error in the prosecutor

drawing the jurors' attention to the night table and arguing that the night table was "the one place in the whole house that those two little girls were interested in."

Likewise, there was no error when the prosecutor argued that Simonetta's story did not correlate with the evidence. "Rhetorical questions commenting on the evidence are not improper. They may permissibly suggest that the defendant's defense is implausible based on the evidence and the reasonable inferences that can be drawn therefrom." Commonwealth v. Fernandes, 478 Mass. 725, 742 (2018).

Next, Simonetta contends that the prosecutor misstated the legal standard for reckless endangerment of a child. Simonetta maintains that several times during the prosecutor's argument the prosecutor improperly equated "conscious, non-accidental choice with conscious disregard." To the extent the jury could have understood the prosecutor to be defining the parameters of the law of reckless endangerment of a child the judge addressed the correct standard in his jury instructions, thus mitigating any prejudice that may have flowed from the argument. A misstatement of the law can be cured with appropriate instructions from the judge. See Commonwealth v. Horn, 23 Mass. App. Ct. 319, 325 (1987) (any harm to defendant resulting from prosecutor's misstatement of law was cured by judge's instructions). The judge also instructed that it is the judge's

job to instruct the jury as to the law. See Commonwealth v. Pagano, 47 Mass. App. Ct. 55, 63-64 (1999) ("[I]t is the judge who instructs the jury on the law, not counsel in argument"). In this light, even if there were error in the argument, there was no substantial risk of a miscarriage of justice.[4]

Lastly, Simonetta maintains that the prosecutor improperly appealed to the jurors' emotions by mentioning the locations in the apartment where Simonetta kept drug paraphernalia and heroin. The statements identified by Simonetta were not improper appeals to sympathy and emotion but rather were comments based on the evidence, or fair inferences that the prosecutor could ask the jury to draw from that evidence. See Commonwealth v. Semedo, 456 Mass. 1, 13 (2010). See also Commonwealth v. Batista, 53 Mass. App. Ct. 642, 646 (2002), quoting Commonwealth v. Casale, 381 Mass. 167, 173 (1980) ("inferences . . . need only be reasonable and possible"). The evidence showed that the Simonetta had secured harmful drugs as well as hypodermic needles in areas other than the bedside table in the past. The prosecutor was attempting to have the jurors draw the inference that Simonetta knew where to store harmful objects so that her daughters could not have access to them.

[4] As to the Simonetta's further claim that the prosecutor improperly argued the objective standard of awareness in her closing, see our discussion on the judge's instruction, supra.

The prosecutor did not improperly refer to matters not in evidence or seek to appeal to the jurors' emotions.

Judgments affirmed.

By the Court (Blake, Lemire & Singh, JJ.[5]),

Joseph F. Stanton

Clerk

Entered: July 17, 2019.

[5] The panelists are listed in order of seniority.